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LONG-TERM DISABILITY INSURANCE PLAN and
Real Party in Interest STANDARD INSURANCE
COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICIA BROYLES,

Plaintiff,

v.

**A.U.L. CORPORATION LONG-TERM
DISABILITY INSURANCE PLAN,**

Defendant,

STANDARD INSURANCE COMPANY,

Real Party in Interest.

No. C-07-5305-MMC

**DEFENDANT A.U.L. CORPORATION
LONG-TERM DISABILITY PLAN'S
NOTICE OF MOTION AND MOTION
TO REVIEW PLAINTIFF'S CLAIM
FOR ERISA BENEFITS UNDER
ABUSE OF DISCRETION STANDARD
OF REVIEW; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: August 1, 2008

Time: 9:00 a.m.

Before the Honorable Maxine M. Chesney

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on August 1, 2008 at 9:00 a.m. in the Courtroom of the Honorable Maxine M. Chesney, located at 450 Golden Gate Ave., San Francisco, A.U.L. Corporation Long-Term Disability Plan (“A.U.L. Plan”) will, and hereby does, move for this Court to order that the decision by Real Party in Interest Standard Insurance Company (“Standard”) to deny the claim of Plaintiff Patricia Broyles (“Plaintiff”) for long term disability benefits be reviewed using a highly deferential abuse of discretion standard.

RELIEF REQUESTED

A.U.L. Plan requests that this Court review Standard’s decision to deny Plaintiff’s claim for long term disability benefits using a highly deferential abuse of discretion standard.

ISSUES PRESENTED

Whether there is sufficient evidence to alter the otherwise applicable highly deferential review of Standard’s denial of Plaintiff’s claim for long-term disability benefits.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit arises from Standard’s decision denying Plaintiff’s claim for Long-Term Disability (“LTD”) benefits. Standard’s decision is reviewed for an abuse of discretion. The degree of deference the Court may afford in its abuse of discretion review may vary upon demonstration by Plaintiff that Standard’s decision was tainted by its structural conflict of interest arising from its role as both decision-maker and funding source. Here, however, the administrative record is the product of a diligent effort to collect relevant information (including medical records), and frequent communications with Plaintiff to ensure a complete record. Standard reviewed the administrative record three times. In each review, it evaluated information provided by Plaintiff and her doctors, and solicited expert medical and/or vocational opinions to inform its decision-making. Accordingly, the Court should apply a highly deferential review for an abuse of discretion.

II. FACTUAL HISTORY

A. The Relevant Terms of the LTD Policy

The policy at issue is Group Long Term Disability Insurance Policy No. 638213-T ("Plan Policy") which was issued by Standard to A.U.L. Corporation, effective January 1, 2000, as amended from time to time. Declaration of George Chan ("Chan Decl.") Ex. 1.

1. The Plan Policy Provides Discretion to Standard

The "Allocation of Authority" section of the Plan Policy provides that Standard has full authority to administer claims. This section provides:

Except for those functions which the Group Policy specifically reserves to the Policyowner or Employer, we have full and exclusive authority to control and manage the Group Policy, to administer claims, and to interpret the Group Policy and resolve all questions arising in the administration, interpretation, and application of the Group Policy.

Our authority includes, but is not limited to:

1. The right to resolve all matters when a review has been requested;
2. The right to establish and enforce rules and procedures for the administration of the Group Policy and any claim under it;
3. The right to determine
 - a. Your eligibility for insurance
 - b. Your entitlement to benefits
 - c. The amount of benefits payable to you
 - d. The sufficiency and the amount of the information may reasonably require to terminate a, b, or c. above."

Subject to the review procedures of the Group Policy, any decision we make in the exercise of our authority is conclusive and binding.

Chan Decl. Ex. 1 at 006-07.¹

2. The Definition of Disability

The Plan Policy specifically sets forth the criteria a claimant must meet to be considered

¹ For ease of reference, the A.U.L. Plan will omit "STND1149-00" from its page references, and simply cite to the last three numbers of each document's Bates stamp.

1 “Disabled.” For the first 24 months of LTD benefits, often referred to as the “Own Occupation”
 2 period, a claimant must be “unable to perform with reasonable continuity the Material Duties of
 3 [her] Own Occupation.” Chan Decl. Ex. 1 at 021. Material Duties means the “essential tasks,
 4 functions and operations, and the skills, abilities, knowledge, training and experience, generally
 5 required by employers from those engaged in a particular occupation.” *Id.* at 020.

6 3. The Benefit Waiting Period

7 Additionally, the Plan Policy provides a 90-day Benefit Waiting Period, precluding
 8 payment of LTD benefits unless the claimant has been disabled throughout the waiting period.
 9 *Id.* at 026, 004. Because Plaintiff ceased work on September 14, 2005 (Chan Decl. Ex. 2 at 173),
 10 her Benefit Waiting Period ended on December 14, 2005.

11 4. When Insurance Ends Under the Plan Policy

12 The Plan Policy provides that insurance ends upon the occurrence of certain specified
 13 events. Specifically, the Plan Policy provides in the When Your Insurance Ends section that
 14 coverage ends automatically on the earliest of:

15

16 4. The date your employment terminates.

17 5. The date you cease to be a Member. However, your
 18 insurance will be continued during the following periods when you
 are absent from Active Work, unless it ends under any of the above.

19

20 b. During leave of absence if continuation of your insurance
 21 under the Group Policy is required by a state-mandated family or
 medical leave act or law.

22 *Id.* at 022. Plaintiff’s Insurance Ended On December 8, 2005, following the end of her leave of
 23 absence under the Family Medical Leave Act. Chan Decl. Ex. 3 at 345.

24 **B. Administration of Plaintiff’s Claim for LTD Benefits**

25 Plaintiff worked at A.U.L. Corporation as a claims payable adjuster, which is a sedentary
 26 occupation. Chan Decl. Ex. 4 at 169. On September 14, 2005, she ceased work. Chan Decl.
 27 Ex. 2 at 173. Under the Family Medical Leave Act, Plaintiff was considered on a leave of
 28 absence without pay until December 8, 2005. Chan Decl. Ex. 3 at 345. On November 28, 2005,

1 Plaintiff submitted the Employee Statement in support of her claim for LTD benefits. Chan Decl.
2 Ex. 5 at 279.

3 1. Standard Collected Information Relevant to Plaintiff's Claim, and
4 Appropriately Consulted with Experts Prior to Making its Decision to
5 Deny Plaintiff's Claim.

6 Standard conducted a thorough review in evaluating Plaintiff's claim. As an initial matter,
7 Standard confirmed receipt of the claim with Plaintiff by telephone conference and "explained
8 [the] process" of claim administration. Chan Decl. Ex. 6 at 280. Additionally, because Plaintiff
9 indicated on her Employee Statement that she had not received a certificate of coverage, Standard
10 requested that A.U.L. Corporation provide one. Chan Decl. Ex. 7 at 284. On December 28,
11 2005, Plaintiff and Shannon Teed, a disability benefits analyst at Standard, spoke by telephone.
12 Confidential Declaration of George Chan ("Conf. Chan Decl.") Ex. 8 at 288-91. Ms. Teed
13 documented the conversation, noting Plaintiff's description of her medical condition, medication,
14 and employment history. *Id.* On December 30, 2005, Standard wrote to Plaintiff, explaining that
15 although an initial review had been completed, its administration was not complete because it
16 needed to obtain additional information. Chan Decl. Ex. 9 at 298-300.

17 Standard diligently sought to acquire complete medical records. This process included
18 frequent communications between Standard and Plaintiff. On January 3, 2006, Standard
19 requested Dr. Pfeffer's medical records and an Attending Physician Statement, as well as other
20 records. Chan Decl. Ex. 10 at 303-04, 305, 311. And on January 4, 2006, Standard spoke with
21 Plaintiff again and discussed Plaintiff's health, the process of administering the claim, and Dr.
22 Pfeffer's proper mailing address. Conf. Chan Decl. Ex. 11 at 307-09. In January and February of
23 2006, Standard made repeated efforts to obtain the records, and it continuously kept Plaintiff
24 apprised of that effort and the complications that arose from the relocation of Dr. Pfeffer's
25 practice to Los Angeles from San Francisco. Conf. Chan Decl. Ex. 12 at 312, 321, 329, 331, 336-
26 40. On February 15, 2006, Standard notified Plaintiff that it had received the medical records
27 from Dr. Pfeffer. Chan Decl. Ex. 13 at 342. On March 3, 2006, Standard confirmed by letter that
28 it would be able to complete its review by April 2, 2006. Chan Decl. Ex. 14 at 344.

Standard reviewed the records and appropriately consulted with experts. For example, Standard submitted Plaintiff's medical records to a Physician Consultant, Dr. David Waldram, board certified in orthopedics, and a Nurse Consultant, Anne Jordan, both of whom reviewed Plaintiff's records. Conf. Chan Decl. Ex. 15 at 209-10. Dr. Waldram is not an employee of Standard. Chan Decl. ¶ 15. His curriculum vitae (which is part of the administrative record) confirms that he has practiced for over thirty years and that he holds a position on the Advisory Board to Oregon Health Systems. Chan Decl. Ex. 16 at 261-62. Nurse Jordan drafted a summary of medical records, noting Dr. Waldram concluded that Plaintiff was capable of sedentary work. Chan Decl. Ex. 15 at 209-10. Importantly, Dr. Waldram noted his opinion was "consistent with recommendations from the claimant's primary orthopedist, Dr. Pfeffer, who reports on the 12/07/05 APS the claimant is capable of sedentary work."² Additionally, Standard sought information from a Vocational Consultant and received a report that Plaintiff's occupation was sedentary in nature. Chan Decl. Ex. 4 at 169.

Standard considered Dr. Waldram's opinion, the Vocational Consultant's report, and Plaintiff's medical records in its review and concluded that Plaintiff was not disabled from her "Own Occupation." By a six page letter, dated March 28, 2006, Standard explained its review process, its conclusions from the records it had received, the applicable Plan Policy provisions, its decision to deny Plaintiff's claim and the appeal process. Conf. Chan Decl. Ex. 18 at 361-66.

Subsequently, Plaintiff requested copies of all medical records reviewed in the administration of her claim and Standard provided them to her on May 10, 2006. Chan Decl. Ex. 19 at 370.

2. Plaintiff Appealed Standard's Initial Decision and Standard Upheld its Initial Decision

Plaintiff contacted Standard by telephone to inquire about an appeal of the denial of her

² The Attending Physician Statement included the question, "What reasonable work or job site modifications could the employer make to assist the individual to return to work? Please specify:", and Dr. Pfeffer answered this question with "sedentary work." Conf. Chan Decl. Ex. 17 at 181-82.

1 claim. Conf. Chan Decl. Ex. 20 at 371. She expressed two concerns. First, Plaintiff asserted
2 Standard had not fully considered the impact of her left knee replacement. *Id.* Second, she
3 asserted there were “a lot discrepancies in her file and [Standard] didn’t get a complete picture of
4 what was happening.” *Id.* (Standard notes of conversation with Plaintiff). Standard explained the
5 review process and suggested that Plaintiff provide all the information she felt was not considered
6 in her initial review, and Plaintiff agreed to include it. *Id.*

7 Plaintiff requested review of the decision to deny her claim for LTD benefits by letter
8 dated July 25, 2006. Conf. Chan Decl. Ex. 21 at 372-73. In her request, she asserted that her
9 current condition rendered her disabled from her occupation. *Id.*

10 Standard followed up on the issues identified by Plaintiff in her request for review. On
11 July 31, 2006, Standard spoke with Plaintiff by telephone and discussed the process of reviewing
12 her LTD benefits claim decision. Conf. Chan Decl. Ex. 22 at 374. Plaintiff indicated that she
13 would be submitting medical records documenting her knee replacement, physical therapy notes,
14 and proof of pain medications. *Id.* She also requested that Standard confirm the information
15 conveyed in the telephone conference by writing, which Standard did by letter dated August 3,
16 2006. Chan Decl. Ex. 23 at 376. By early October, Standard had not received the additional
17 information from Plaintiff. Chan Decl. Ex. 24 at 379. As a result, Standard wrote to Plaintiff,
18 again after a conversation to the same effect, to confirm that the records were forthcoming and
19 that her review could not proceed without them. *Id.* Standard agreed to defer review until receipt
20 of the records. *Id.* On November 20 and 21, 2006, Plaintiff and Standard communicated in
21 regard to the records Plaintiff agreed to provide. Chan Decl. Ex. 25 at 381-84. By letter dated
22 November 20, 2006, Standard confirmed that it was in receipt of the additional records Plaintiff
23 had sent through to that date, and that the review process would not begin until Plaintiff finished
24 providing the additional information she wanted reviewed. Chan Decl. Ex. 26 at 386. After
25 receipt of records from Plaintiff, on December 11, 2006, Standard notified Plaintiff by letter that
26 it was forwarding her claim for medical review. Chan Decl. Ex. 27 at 394.

27 The records submitted by Plaintiff included additional medical records, physical therapy
28 records, and letters from her doctors. Regarding Plaintiff’s assertions concerning her knee

1 replacement, Standard reviewed a letter from Dr. Michael Shifflet to Standard Insurance
2 Company dated October 11, 2006. Conf. Chan Decl. Ex. 28 at 254. This letter indicated that
3 Plaintiff had been under his care since February 2006 and had a knee replacement performed in
4 April 2006. *Id.* Dr. Shifflet also indicated that Plaintiff was scheduled for a similar procedure on
5 her other knee and concluded that she was incapable of returning to work until approximately
6 July 1, 2007. *Id.*

7 Standard also reviewed additional information from Dr. Pfeffer and from her physical
8 therapist. At Plaintiff's request, Dr. Pfeffer wrote to Standard on November 20, 2006. Conf.
9 Chan Decl. Ex. 29 at 390. He asserted that she was "incapable of working in her own occupation
10 and any other occupation either on a full or part time basis, including sedentary work, since
11 September, 15, 2005." *Id.* Standard also reviewed Plaintiff's physical therapist records,
12 including her discharge statement from physical therapy on October 28, 2005. Conf. Chan Decl.
13 Ex. 30 at 252. This statement, from Rob Gordon to Dr. Pfeffer, concluded that Plaintiff was
14 capable of "45 minutes of consistent cardiovascular exercise" and "that she was told at her last
15 MD visit that she should join a gym and stop physical therapy." *Id.*

16 Standard forwarded Plaintiff's claim file, including the additional documents supplied by
17 Plaintiff, to Dr. Waldram to consider the newly provided records. Conf. Chan Decl. Ex. 31 at
18 265-66. Dr. Waldram considered both Plaintiff's knee and ankle surgeries. *Id.* He concluded
19 neither would inhibit her from sedentary work, provided she would not be required to walk more
20 than "3 or 4 blocks." *Id.* at 265. Dr. Waldram also considered the impact of medications on
21 Plaintiff's ability to work. *Id.*

22 Standard considered this new information and placed it in the context of all information
23 reviewed up to that point. Conf. Chan Decl. Ex. 32 at 414-16. Standard concluded the new
24 information did not support that Plaintiff was disabled from her Own Occupation during the
25 relevant time period. *Id.* By a three page letter dated February 7, 2007, Standard's Benefits
26 Department upheld its decision. Specifically, Standard responded to Plaintiff's two concerns by
27 explaining its conclusion that Plaintiff's foot pain did not disable her from a sedentary position
28 and noting that her knee operation occurred five months after her insurance ended and was

1 therefore not a basis for the payment of benefits. *Id.* The claim was then forwarded to Standard's
 2 Administrative Review Unit ("ARU") for an independent review. *Id.*

3 3. Standard's Administrative Review Unit Affirmed the Decision to Deny
 4 Benefits

5 Because the benefits department did not change its decision, the ARU reviewed the claim.
 6 Chan Decl. Ex. 33 at 417. The ARU is a different department at Standard, and the analyst
 7 assigned to the claim had no part in the original claim decision. Chan Decl. ¶ 24. As part of the
 8 independent review process, Plaintiff's medical records were reviewed by an additional Physician
 9 Consultant, Dr. Joseph Mandiberg, board certified in orthopedic surgery. Prior to Dr.
 10 Mandiberg's review, he was not consulted regarding the decision to deny the claim. Chan Decl.
 11 Ex. 33 at 417. Dr. Mandiberg is not an employee of Standard. Chan Decl. ¶ 25. His curriculum
 12 vitae confirms that he has practiced for over thirty years, the majority of which have been in
 13 private practice. Chan Decl. Ex. 34 at 269. Dr. Mandiberg concluded that while Plaintiff's foot
 14 and knee conditions limited her ability to stand for "prolonged" periods, he could not "see why
 15 she cannot do a sit-down job with the ability to stand up and move around as needed." Chan
 16 Conf. Decl. Ex. 35 at 274. He also noted that although her medical records indicated ongoing
 17 issues with her foot and knee, "nobody has given a reason why a person with foot problems
 18 cannot do a sedentary job." *Id.* at 273. Standard also asked Dr. Mandiberg to evaluate whether
 19 Plaintiff's medication may result in limitations and restrictions. *Id.* He did not find "an
 20 impairment relative to [Plaintiff's] medication." *Id.*

21 After compiling and reviewing an administrative record of 462 pages (Chan Decl. ¶ 27),
 22 on March 15, 2007, Standard informed Plaintiff by a six page letter that an independent review
 23 affirmed Standard's decision to deny Plaintiff's claim for LTD benefits. Conf. Chan Decl. Ex. 36
 24 at 419-24. This letter provided a summary of available information and explained in detail why
 25 Standard reached the conclusion that Plaintiff could perform the material duties of her own
 26 sedentary occupation at the time she ceased work and throughout the 90-day Benefit Waiting
 27 Period. *Id.* In addition, Standard explained that any disability caused by her 2006 knee surgery
 28 could not be weighed in Standard's evaluation under the Plan Policy because Plaintiff was no

1 longer a covered member under the Policy after December 8, 2005. *Id.* The ARU affirmed the
2 denial of Plaintiff's claim. *Id.*

3 **III. ARGUMENT**

4 **A. Standard's Decision is Reviewed for an Abuse of Discretion**

5 It is well-established that if an ERISA plan gives the claim administrator discretionary
6 authority to determine eligibility for benefits or to construe the terms of the plan, a reviewing
7 court may reverse the denial of benefits only upon a finding of abuse of discretion. *See*
8 *Metropolitan Life Ins. Co. v. Glenn*, 552 U.S. ___, 128 S. Ct. 1117, 169 L. Ed. 2d 845, 2008
9 LEXIS 5030, *12-13, 18 (2008)³; *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 115 (1989);
10 *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 965 (9th Cir. 2006); *Bendixen v. Standard*
11 *Ins. Co.*, 185 F.3d 939, 943 (9th Cir. 1999) (applying abuse of discretion standard to the exact
12 same policy language). The Plan Policy here contains an express Allocation of Authority clause
13 that grants Standard complete discretion "to control and manage the Group Policy, to administer
14 claims, and to interpret the Group Policy and resolve all questions arising in the administration,
15 interpretation and application of the Group Policy." Chan Decl. Ex. 1 at 007. In reviewing the
16 same Allocation of Authority provision, the Ninth Circuit concluded: "In this case, the policy
17 language clearly confers discretion on Standard to decide whether a claimant is disabled.
18 Therefore, the standard is abuse of discretion." *Bendixen*, 185 F.3d at 943 (affirming summary
19 judgment for Standard based on an abuse of discretion review after holding Allocation of
20 Authority provision confers discretion). Thus, an abuse of discretion standard is triggered by the
21 language of the Plan Policy at issue here. *Abatie*, 458 F.3d at 965.

22 The Supreme Court's recent decision in *Glenn* affirms the application of an abuse of
23 discretion review when a plan administrator has a structural conflict of interest. A structural
24 conflict of interest exists, where, as here, the claim administrator is also responsible for payment
25 of the claim. *Glenn*, 2008 LEXIS 5030, *12; *Abatie*, 458 F.3d at 965 (applying the label
26 "structural conflict of interest"). In *Glenn*, the Court extended its decision in *Firestone*, holding

27
28 ³ For efficiency, this Motion cites to the 2008 LEXIS 5030 printing of this case.
Pagination from official reporters is unavailable due to the decision's very recent publication.

1 that that a structural conflict of interest “should ‘be weighed as a factor in determining whether
 2 there is an abuse of discretion.’” *Glenn*, 2008 LEXIS 5030, *18 (quoting *Firestone*, 489 U.S. at
 3 115). It further clarified, “[w]e do not believe that *Firestone*’s statement implies a change in the
 4 standard of review, say, from deferential to *de novo* review.” *Id.* (emphasis in original). Rather,
 5 the Court held, “we believe that *Firestone* means what the word factor implies,” the structural
 6 conflict of interest is one of “several different considerations” that the Court must take into
 7 account. *Id.* at *21.

8 Although the Supreme Court’s holding in *Glenn* allows an abuse of discretion review to
 9 become more skeptical under certain circumstances, those circumstances are not present here.
 10 *Glenn* allows a less deferential abuse of discretion review if there is evidence that a structural
 11 conflict of interest impacted the decision. *Id.* at *18; accord *Abatie*, 458 F.3d at 968. For
 12 example, the structural conflict of interest may “prove more important (perhaps of great
 13 importance) where circumstances suggest a higher likelihood that it affected the benefits
 14 decision,” but in contrast, the conflict should “prove less important (perhaps to the vanishing
 15 point) where the administrator has taken active steps to reduce potential bias and to promote
 16 accuracy....” *Id.* at *21-22. As the Ninth Circuit held in *Abatie*, the effect of a conflict “may be
 17 low if a structural conflict of interest is unaccompanied, for example, by any evidence of malice,
 18 of self dealing, or a parsimonious claims-granting history.” *Abatie*, 458 F.3d at 968.

19 **B. Standard’s Decision is Entitled to a High Degree of Deference when Reviewed**
 20 **for an Abuse of Discretion**

21 Standard provided Plaintiff with a full and fair review. Its review is not accompanied by
 22 “any evidence of malice, self dealing, or a parsimonious claims-granting history.” *Abatie*, 458
 23 F.3d at 968. The burden to demonstrate that Standard’s structural conflict of interest should
 24 weigh “heavily” in this Court’s review for an abuse of discretion falls upon the Plaintiff. *See*
 25 *Abatie*, 458 F.3d at 969. Plaintiff has not initiated discovery, thus, the evidence Plaintiff may rely
 26 upon will be limited to the administrative record. The administrative record shows a
 27 conscientious and thorough claim administration, and Plaintiff cannot meet her burden of
 28 demonstrating that less deference toward Standard’s decision is warranted. Accordingly,

Standard's administration of Plaintiff's claim does not merit weighing the structural conflict of interest heavily.

As set forth above, Standard conducted a full and fair review of Plaintiff's claim, ultimately compiling a record of 462 pages. Chan Decl. ¶ 27. "When an administrator can show that it has engaged in an 'ongoing, good faith exchange of information between the administrator and the claimant,' the court should give the administrator's decision broad deference notwithstanding a minor irregularity." *Abatie*, 458 F.3d at 972 (quoting *Jebian v. Hewlett – Packard Co. Empl. Benefits Org. Income Prot. Plan*, 349 F.3d 1098, 1107 (9th Cir. 2003)). Standard engaged in a "good faith exchange" with Plaintiff. It communicated regularly with Plaintiff regarding her claim and it gathered and reviewed information from all of her treating physicians, including those Plaintiff saw after her insurance had ended. *See supra* Part I.B.1-2. Standard provided a detailed letter explaining its initial decision, including instructions as to the appeal process. Chan Decl. Ex. 16 at 261-66. Standard gathered additional information provided by Plaintiff when she appealed Standard's decision, and conducted another review of her claim. *See supra* Part I.B.2. Additionally, Standard conducted a third independent review of Plaintiff's claim. Conf. Chan Decl. Ex. 36 at 419-24. As part of each review, Standard consulted with physicians, and provided a detailed and thorough explanation of Standard's decision and decision-making process. *Id.*; cf. *Glenn*, 2008 LEXIS 5030, *23 (holding conflict of interest affected Plan administrator's decision, in part, because of failure "to provide its vocational and medical experts with all of the relevant evidence.").

The lack of evidence that Standard's structural conflict of interest should be weighed heavily makes this case analogous to *Muskowite v. Everen Capital Corp. Group Disability Income Plan*, 2008 LEXIS 22286 (N.D. Cal. March 20, 2008) (Chesney, J.), where this Court held that plaintiff provided "no basis" to weigh the presence of a structural conflict of interest heavily. *Id.* at *34. Mere allegations, for example, that the "defendant did not consider certain evidence submitted by the plaintiff," that the plaintiff's award of social security benefits was ignored, and that the defendant did not properly evaluate the plaintiff's pain symptoms, were unpersuasive reasons to apply less deference in reviewing for an abuse of discretion. *Id.* at *31-

1 34.

2 As described herein, the administrative record supports a high degree of deference toward
 3 Standard's decision. Plaintiff's claim was reviewed by independent medical consultants, and the
 4 review process was thorough and appropriate. *See supra* Part I.B.2-3. The curricula vitae of the
 5 physician consultants describe considerable medical experience and employment by independent
 6 medical providers. *Muskowite*, 2008 LEXIS 22286 at *30-31 (concluding that physician
 7 consultants' curricula vitae demonstrated their expertise and lack of bias). This is exactly the
 8 type of "affirmative evidence" that *Abatie* envisioned being "brought forth" by plan
 9 administrators to support finding a high degree of deference. *Abatie*, 458 F.3d at 969 n.7.
 10 Accordingly, this Court should apply a "low" "level of skepticism" in reviewing Standard's
 11 decision for an abuse of discretion. *Id.* at 968.

12 **IV. CONCLUSION**

13 For the reasons described herein, the motion of A.U.L. Plan should be granted.

14
 15 Dated: June 27, 2008

Respectfully submitted,

16 Jones Day

17
 18 By: /s/ Katherine S. Ritchey
 19 Katherine S. Ritchey

20 for Defendant A.U.L. CORPORATION
 21 LONG-TERM DISABILITY INSURANCE
 22 PLAN and Real Party in Interest
 23 STANDARD INSURANCE COMPANY
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